DATO' VIJAY KUMAR NATARAJAN A

v.

UOL CREDIT SDN BHD

COURT OF APPEAL, PUTRAJAYA B
ABDUL WAHAB PATAIL JCA
CLEMENT SKINNER JCA
MOHAMAD ARIFF YUSOF J
[CIVIL APPEALS NO: W-02-1075-2010 & W-02-1073-2010]
3 MARCH 2013 C

COMPANY LAW: *Shares - Wrongful detention of shares - Allegation that shares had been transferred to another account for repayment of third party debt - Claim for return of shares by shareholder - Whether shares wrongfully withheld - Claim for direct and consequential losses - Whether damages must be assessed for actual period where shares were wrongly retained until judgment date - Whether pre-judgment interest should be granted* D

CIVIL PROCEDURE: *Damages - Interest - Wrongful detention of shares - Allegation that shares had been transferred to another account for repayment of third party debt - Claim for return of shares by shareholder - Assessment of damages - Whether damages should run up to date of judgment or until date of return of goods detained - Whether pre-judgment interest should be awarded* E F

In early 1998, there was a dispute between the parties leading to the filing of an action by the respondent against the appellant but the parties reached a settlement. A settlement agreement was concluded and dated 23 December 1998 ('the settlement agreement date'). However, in 1999, the respondent informed the appellant that his trading account had been closed and that all the shares had been transferred to another account as security for the repayment of a third party's debt to the respondent. The appellant proceeded to file a claim for the return of his Mercury Industries Berhad shares ('MIB shares') and damages, as it was alleged that after the settlement agreement, the respondent wrongfully withheld the appellant's shares including the MIB shares. The High Court allowed the claim and the order of the Senior Assistant Registrar ('SAR') dated 7 October 2009 ordered the respondent to pay the appellant the sum of RM1,058,865.65 G H I

A and RM157,360 as direct and consequential losses respectively. The respondent was also ordered to pay the amount of damages with interest from 20 June 2000 ('the judgment date'). In the High Court, the respondent appealed against the decision on the direct loss while the appellant appealed against the decision not
B to order pre-judgment interest. The former appeal succeeded but the latter appeal was dismissed. The High Court Judge held that damages must be assessed for the actual period where the shares were wrongly retained by the respondent which was the date of the settlement agreement until the judgment date. It was further
C held that the SAR, at the stage of assessment of damages, had no discretion pursuant to s. 11 of the Civil Law Act 1956 ('the Act'), to order interest prior to the judgment. The MIB shares were returned to the appellant in October 2007 but the shares were then subjected to undertakings given by the appellant before
D the Court of Appeal that he would not sell, transfer, charge and/ or deal in any manner whatsoever in the said MIB shares until the decision of the appeal to the Federal Court. The respondent had earlier appealed to the Court of Appeal against the order of the High Court dated 20 June 2000 and filed for stay of execution of
E the said judgment. The stay of execution was allowed by the Court of Appeal pending disposal of the appeal. The respondent's appeal to the Court of Appeal was dismissed whereupon the stay order lapsed. The respondent then applied for leave to appeal to the Federal Court. It was pending the disposal of the application
F in the Federal Court that the order for the return of the shares coupled with the undertakings was granted. The application for stay before the Court of Appeal pending the hearing of leave to appeal to the Federal Court was allowed on 21 November 2007. The Federal Court then refused application for leave and the
G appellants then sold the MIB shares on the open market. The issues that called for the court's adjudication in the present appeal were: (i) where liability was founded in detinue; whether the damages ordered by the court should run up to the date of judgment or until the date of return of goods detained; and
H (ii) whether in the case of detinue, pre-judgment interest should be awarded by the court.

Held (allowing appeal; setting aside order of High Court);

I **(1)** The appellant's claim was a claim in detinue for which the express prayer was for a return of the shares and damages for its wrongful detention. The claim was not a claim for the value of goods *ie*, the value of the shares *per se*. If it were for the

value of the shares, then damages would be appropriately assessed as at the date of the judgment. Where the claim for relief was for the return of the goods and damages for its wrongful detention, damages would be calculated up to the date of actual return of the goods. (para 10)

(2) Where there was a refusal to return the goods after they became due, the continued detention remains wrongful and the appellant might recover damages where he had suffered loss from a fall in the value of goods between the date of the respondent's refusal and the date of the actual return. (para 10)

(3) The appellant was prevented from dealing with the shares post-judgment because of the stay applications, the appeal to the Court of Appeal and the application to stay before the Federal Court. Although the MIB shares were in fact returned to the appellant in October 2007, the appellant could not deal with the shares because of the undertakings imposed by the Court of Appeal order. It was only after the application for leave to appeal to the Federal Court was set aside that the appellant could freely deal with the MIB shares. The respondent sold the shares on the open market immediately after the Federal Court decision and in such circumstances, he should be allowed to claim for the loss in value between the date of the initial wrongful detention until the date of return *ie*, the date when full ownership of the shares was returned to him free of undertakings on dealings. By choosing to appeal and applying for the stay orders, the respondent took the risk that the MIB shares could fall in value. The principle of *damnum absque injuria* should not be a complete bar to a rightful claim for damages for the fall in value of the shares. (para 11)

(4) It was implicit in any assessment of damages that pre-judgment interest could be awarded. Section 11 of the Act is sufficiently broadly worded to allow the pre-judgment interest even at the stage of assessment of damages. The order of the High Court dated 23 June 2000 was for the SAR to assess the damages suffered by the appellant. It was implicit in such an order that the SAR could award interest in the damages assessed and there was no impediment under s. 11 of the Act which could have prevented the SAR from awarding pre-judgment interest. (para 14)

A ***Bahasa Malaysia*** *Translation Of Headnotes*

Pada awal tahun 1998, telah berlaku pertikaian antara pihak-pihak yang membawa kepada pemfailan satu tindakan oleh responden terhadap perayu tetapi pihak-pihak berjaya mencapai penyelesaian. B Satu perjanjian penyelesaian bertarikh 23 Disember 1998 telah diputuskan ('tarikh perjanjian penyelesaian'). Walau bagaimanapun, pada tahun 1999, responden memaklumkan kepada perayu bahawa akaun perniagaannya telah ditutup dan bahawa saham-saham telah dipindahkan ke akaun lain sebagai jaminan bagi pembayaran semula C hutang pihak ketiga kepada responden. Perayu memfailkan tuntutan bagi pemulangan semula saham-saham Mercury Industries Berhad ('saham-saham MIB') dan ganti rugi, kerana dihujahkan bahawa selepas perjanjian penyelesaian, responden telah dengan salah menahan saham-saham perayu termasuk saham-saham MIB D tersebut. Mahkamah Tinggi membenarkan tuntutan dan perintah Penolong Kanan Pendaftar ('PKP') bertarikh 7 Oktober 2009 memerintahkan responden untuk membayar kepada perayu jumlah sebanyak RM1,058,865.65 dan RM157,360 bagi kerugian langsung dan kerugian berbangkit dan responden juga diperintahkan untuk E membayar jumlah kerugian dengan faedah bermula dari 20 Jun 2000 ('tarikh penghakiman'). Di Mahkamah Tinggi, responden merayu terhadap keputusan kerugian langsung manakala perayu merayu terhadap keputusan tidak memerintahkan faedah pra-penghakiman. Rayuan responden berjaya tetapi rayuan perayu F ditolak. Hakim Mahkamah Tinggi memutuskan bahawa kerugian mestilah ditaksirkan bagi tempoh sebenar yang mana saham-saham telah dipegang secara salah oleh responden iaitu tarikh perjanjian penyelesaian sehingga tarikh penghakiman. Diputuskan selanjutnya bahawa PKP, ketika peringkat taksiran kerugian, tidak mempunyai G budi bicara di bawah s. 11 Akta Undang-Undang Sivil 1956 ('Akta'), untuk memerintahkan faedah sebelum penghakiman. Saham MIB diserahkan kepada perayu pada Oktober 2007 tetapi saham-saham tersebut tertakluk kepada akujanji yang diberikan oleh perayu di Mahkamah Rayuan bahawa dia tidak akan menjual, H memindahkan, menggadaikan dan/atau berurusan dalam apa jua cara dengan saham MIB tersebut sehingga keputusan rayuan ke Mahkamah Persekutuan. Responden telah, pada awalnya, merayu ke Mahkamah Rayuan terhadap perintah Mahkamah Tinggi bertarikh 20 Jun 2000 dan memfailkan penangguhan pelaksanaan I penghakiman tersebut. Penangguhan pelaksanaan dibenarkan oleh Mahkamah Rayuan sementara menantikan pelupusan rayuan.

Rayuan responden ke Mahkamah Rayuan ditolak di mana perintah penangguhan luput. Responden kemudiannya memohon kebenaran untuk merayu ke Mahkamah Persekutuan. Ia adalah sementara menanti permohonan di Mahkamah Persekutuan bahawa perintah bagi pemulangan saham-saham dan akujanji dibenarkan. Permohonan bagi penangguhan di Mahkamah Rayuan sementara menanti perbicaraan kebenaran untuk merayu di Mahkamah Rayuan dibenarkan pada 21 November 2007. Mahkamah Persekutuan kemudiannya menolak permohonan kebenaran dan perayu-perayu kemudiannya menjual saham MIB di pasaran terbuka. Isu-isu yang perlu diputuskan oleh mahkamah dalam rayuan ini adalah: (i) di mana liabiliti berasaskan detinu, sama ada ganti rugi yang diperintahkan oleh mahkamah harus berakhir hingga tarikh penghakiman atau sehingga pemulangan barangan yang dipegang; dan (ii) sama ada dalam kes detinu, faedah pra-penghakiman sewajarnya diawardkan oleh mahkamah.

Diputuskan (membenarkan rayuan; mengetepikan perintah Mahkamah Tinggi):

(1) Tuntutan perayu adalah tuntutan detinu yang mana tuntutan nyata adalah bagi pemulangan saham-saham dan kerugian bagi penahanan salah. Tuntutan bukanlah tuntutan bagi nilai barangan iaitu nilai saham semata-mata. Jika ianya adalah bagi nilai saham, kerugian akan ditaksirkan sewajarnya pada tarikh penghakiman. Di mana tuntutan bagi relief adalah bagi pemulangan barangan dan kerugian bagi penahanan salahnya, kerugian akan dikira hingga tarikh pemulangan sebenar barangan tersebut.

(2) Di mana berlaku keengganan untuk memulangkan barangan tersebut selepas kesemuanya genap masanya, penahanan yang diteruskan kekal salah dan perayu boleh mendapatkan semula kerugian yang dialaminya daripada kejatuhan nilai barangan tersebut antara tarikh keengganan responden hingga tarikh pemulangan sebenar.

(3) Perayu dihalang daripada berurusan dengan saham-saham pra-penghakiman kerana penangguhan pelaksanaan, rayuan ke Mahkamah Rayuan dan permohonan penangguhan di Mahkamah Persekutuan. Walaupun saham MIB telah, pada hakikatnya, dipulangkan kepada perayu pada Oktober 2007,

perayu masih belum boleh berurusan dengan saham-saham tersebut kerana akujanji yang dikenakan oleh perintah Mahkamah Rayuan. Hanya selepas permohonan bagi kebenaran merayu di Mahkamah Persekutuan ditolak barulah perayu boleh dengan bebas berurusan dengan saham MIB tersebut. Responden telah menjual saham tersebut di pasaran terbuka selepas keputusan Mahkamah Rayuan dan dalam keadaan sedemikian, dia sewajarnya dibenarkan menuntut kerugian bagi nilai antara tarikh berlakunya penahanan salah sehingga tarikh pemulangan iaitu tarikh milikan penuh saham dipulangkan kepadanya tanpa sebarang akujanji terhadap pengurusan. Dengan memilih untuk merayu dan memohon bagi penangguhan pelaksanaan, responden mengambil risiko bahawa nilai saham MIB boleh jatuh. Prinsip *damnum absque injuria* tidak sewajarnya menjadi halangan kepada hak tuntutan ke atas kerugian bagi kejatuhan nilai saham.

(4) Adalah tersirat dalam mana-mana taksiran kerugian bahawa faedah pra-penghakiman boleh diawardkan. Seksyen 11 Akta digubal luas secukupnya untuk membenarkan faedah pra-penghakiman walaupun pada peringkat taksiran kerugian. Perintah Mahkamah Tinggi bertarikh 23 Jun 2000 adalah untuk PKP menaksir kerugian yang dialami oleh perayu. Disiratkan dalam perintah sedemikian bahawa PKP boleh mengawardkan faedah dalam kerugian yang ditaksirkan dan tiada halangan di bawah s. 11 Akta yang menghalang PKP daripada mengawardkan faedah pra-penghakiman.

Case(s) referred to:
Dhian Singh v. Union of India AIR 1958 SC 274 ***(refd)***
Mansfield v. Director of Public Prosecutions for Western Australia [2006] 228 ALR 214 ***(refd)***
Rosenthal v. Alderton & Sons Ltd [1946] 1 KB 374 ***(refd)***
See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors [1997] 2 CLJ 299 CA ***(refd)***
Williams v. Archer [1847] LJCP 82 ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 11

For the appellant - Cyrus Das (David Thomas Mathews, Prakash Lachimanan & S Janagasutha with him); M/s Mathews Hun Lachimanan
For the respondent - Lim Chee Wee (Preetha Pillai with him); M/s Skrine

[Appeal from High Court, Kuala Lumpur; Originating Summons No: D8-24-61-2000]

Reported by Najib Tamby

JUDGMENT

Mohamad Ariff Yusof J:

[1] This appeal was a consolidated appeal where two issues were raised, namely (i) where liability is founded in detinue, whether the damages ordered by the court should run up to the date of judgment or until the date of return of the goods detained, and (ii) whether in the case of detinue, pre-judgment interest should be awarded by the court. The subject matter of the dispute was shares of Mercury Industries Bhd (MIB shares) which were held under a share financing facility granted by the respondent to the appellant. In early 1998, there was a dispute between the parties leading to the filing of an action by the respondent against the appellant in Kuala Lumpur High Court Suit No: D5-22-1680-1998. There was a settlement reached between the parties at the end of December 1998 and a notice of discontinuance was filed. The settlement agreement is dated 23 December 1998.

[2] However, by letter dated 15 March 1999, the respondent informed the appellant that his trading account had been closed and that all the shares had been transferred to another account as security for the repayment of a third party's debt to the respondent.

[3] Arising from this alleged wrongful detention of his shares, the appellant filed action in the Kuala Lumpur High Court (Originating Summons No: R1-24-44-1999) for a court order for the return of his MIB shares and damages suffered by reason of the wrongful detention. This 1999 suit claimed for several declaratory orders, which included a declaration that the defendant, after the earlier said settlement, wrongfully withheld the Plaintiff's shares including the MIB shares, and consequential orders that the defendant return all the shares to the plaintiff forthwith and that the Senior Assistant Registrar do assess the damages suffered by the plaintiff. The plaintiff/appellant succeeded in his claim. The order of the High Court Kuala Lumpur dated 20 June 2000 is included as Tab 2 in the appellant's core bundle. Counsel for the appellant referred to this judgment as "the platform judgment" which formed the basis of the assessment of damages which took place before the Senior Assistant Registrar.

[4] The order of the Senior Assistant Registrar on assessment of damages is dated 7 October 2009. The amended order of the Senior Assistant Registrar relevant for purposes of this appeal read:

> It is hereby ordered that the Defendant do pay the Plaintiff the sum of RM1,058,865.65 as direct loss, the sum of RM157,360.00 as consequential loss and it is further ordered that the Defendant is also required to pay interest on the amount of damages at the rate of 8% per annum from the date of judgment of 23rd June 2000 ...

[5] There were two separate appeals lodged against the decision of the learned Senior Assistant Registrar. The respondent appealed on the direct loss ordered, whilst the appellant appealed on the decision not to order pre-judgment interest. Before the learned High Court Judge, the respondent's appeal in relation to the direct loss succeeded (encl. 62), but the appellant's appeal on pre-judgment interest was dismissed (encl. 79). The broad grounds of decision of the learned High Court Judge is included as Tab 8 in the appellant's core bundle of documents. With respect to the actual loss, the learned High Court Judge held that damages must be assessed for the actual period where shares were wrongly retained by the defendant and this would be from the date of the settlement agreement (23 December 1998) until the date of judgment (20 June 2000). As for pre-judgment interest, the learned High Court Judge held that the Senior Assistant Registrar, at the stage of assessment of damages, had no discretion pursuant to s. 11 of the Civil Law Act to order interest prior to judgment.

[6] The calculation of damages, according to the learned High Court Judge, was to be assessed on the basis of the highest price of the shares during the period from the date of the settlement agreement until the date of judgment, ie, the difference between RM2.50 per share and RM1.93 per share, the latter being price on the date of the judgment.

[7] The learned High Court Judge also held that the issue of consequential damages did not arise as the highest price per share had been taken into account in determining the actual damages. In this consolidated appeal, the issue of consequential damages was not pursued by the appellant.

[8] On the evidence, the MIB shares were returned to the appellant in October 2007 but the shares were then subject to undertakings given by the present appellant before the Court of Appeal that he would not sell, transfer, charge and/or deal in any manner whatsoever in the said MIB shares until the decision of the appeal to the Federal Court, if any. The undertakings were given pursuant to an order of the Court of Appeal dated 21 November 2007. The respondent had earlier appealed to the Court of Appeal against the order of the learned High Court Judge dated 20 June 2000 as earlier mentioned, and had filed for stay of execution of the judgment. The stay of execution was refused by the High Court but allowed by the Court of Appeal pending disposal of the appeal. The respondent's appeal to the Court of Appeal was dismissed on 20 September 2007, whereupon the stay order lapsed. The respondent then applied for leave to appeal to the Federal Court. It was pending the disposal of the application in the Federal Court that the abovesaid order for the return of the shares coupled with the undertakings was granted.

[9] An application for stay before the Court of Appeal pending the hearing of leave to appeal to the Federal Court was allowed on 21 November 2007. The Federal Court refused application for leave on 10 March 2009, and thereupon the appellants sold the MIB shares in the open market at the price of RM0.33 per share on 10 March 2009.

[10] We allowed the consolidated appeal by a unanimous decision both on the issue of damages and pre-judgment interest. We agreed with the arguments of counsel for the appellant that the appellant's claim was a claim in detinue for which the express prayer was for a return of the shares and damages for the wrongful retention. The claim was not a claim for the value of the goods ie, the value of the shares *per se*. If it were for the value of the shares, then damages would be appropriately assessed as at the date of the judgment. We agreed that where the claim for relief is for the return of the goods and damages for its wrongful detention, damages would be calculated up to the date of actual return of the goods. In the course of submission, *Rosenthal v. Alderton & Sons Ltd* [1946] 1 KB 374 was cited in argument. The statement of the law by Evershed LJ in that case is clear. Where there is a refusal to return the goods after they become due, the

A continued detention remains wrongful and the plaintiff may recover damages where he has suffered loss from a fall in the value of the goods between the date of the defendant's refusal and the date of actual return. See also *Williams v. Archer* [1847] LJCP 82 which was cited in *Rosenthal v. Alderton & Sons Ltd*, *supra*. We were B equally persuaded by the proposition of Bhagwati J in *Dhian Singh v. Union of India* AIR 1958 SC 274 that detinue is categorised as a "continuing wrong".

[11] In our considered view, the appellant had been prevented C from dealing with the shares post-judgment because of the stay applications, the appeal to the Court of Appeal and the application to stay before the Federal Court. Although the MIB shares were in fact returned to the appellant in October 2007, the appellant could still not deal with the shares because of the D undertakings imposed by the earlier-stated Court of Appeal order. It was only after the application for leave to appeal to the Federal Court was set aside by the Federal Court that the appellant could freely deal with the MIB shares. He sold the shares on the open market immediately after the Federal Court decision on 10 March E 2009, and in such circumstances he should be allowed to claim for the loss in value between the date of the initial wrongful detention until the date "of return", which could only in fairness be interpreted to mean the date when full ownership of the shares was returned to him free of undertakings on dealings. By choosing F to appeal and applying for the stay orders, the respondent took the risk that the MIB shares could fall in value, and in such circumstances the principle of *damnum absque injuria* should not be a complete bar to a rightful claim for damages for the fall in value of the shares. The respondent cites, *inter alia*, *Mansfield v. Director* G *of Public Prosecutions for Western Australia* [2006] 228 ALR 214 for the following proposition:

> ... And if the legal right is doubtful, either in point of law or of fact, the court is always reluctant to take a course which may result in material injury to either party; for the damage arising H from the act of the court itself is damnum absque injuria, for which there is no redress except a decree for the costs of the suit or in a proper case an action for malicious prosecution. To remedy this difficulty, the court in the exercise of its discretion, frequently resorts to the expedient of imposing terms and conditions upon the party at whose instance it proposes to act... I

[12] We noted that this passage was said in the context of injunctive relief, not a claim for damages for a continuing wrong such as detinue. Likewise, the general propositions on the discretionary powers of the court to grant stay in *See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors* [1997] 2 CLJ 299 were not related specifically to a "continuing wrong". There could of course be situations where the court would protect the judgment creditor "by the accumulation of interest to compensate it for the delays in recovery", but we do not believe this discretionary element should be rigidly applied across the board. For detinue, we felt it was proper to assess damages based on actual loss incurred until effective return of the goods detained, where the plaintiff had claimed for such damages. It would be different of course had he merely claimed for a return of the goods simpliciter.

[13] We must say in this connection we were not persuaded by the respondent's argument that the appellant had not proven his loss. The facts spoke for themselves; there was a drastic fall in the value of the MIB shares from the date of the first wrongful detention until the date of their effective and complete return.

[14] On the second issue of pre-judgment interest, in our view it was implicit in any assessment of damages that pre-judgment interest could be awarded. Section 11 of the Civil Law Act 1956 is sufficiently broadly worded to allow the award of pre-judgment interest even at the stage of assessment of damages. The order of the High Court dated 23 June 2000 was for the Senior Assistant Registrar to assess the damages suffered by the plaintiff. It was implicit in such an order that the Senior Assistant Registrar could award interest on the damages assessed, and we did not see any impediment under s. 11 of the Civil Law Act 1956 which could have prevented the Senior Assistant Registrar from awarding pre-judgment interest. In "any proceedings" tried in any court for the recovery of damages, the court "may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment."

[15] As earlier stated, we allowed the appeal both on damages and pre-judgment interest with costs of RM20,000 to be paid by the respondent to the appellant. We ordered the deposit to be refunded. The judgment of the High Court was set aside, and judgment ordered to be entered as follows:

> Judgment for the sum of RM1,058,865.65 together with interest thereon at 8% per annum from 23.12.1998 to date of judgment, i.e., 23.6.2000, and 8% per annum until 1.3.2011, and interest thereafter at 4% per annum from 2.3.2011 until final payment less payments made by the Respondent previously.

[16] The rate of interest at 4% was ordered based on the change in the allowable rate of interest under the Rules of the High Court 1980 then applicable.